UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

KIEFT BROTHERS, INC.

and

GENERAL TEAMSTERS, CHAUFFEURS, SALESDRIVERS AND HELPERS, LOCAL 673

and

JAIME NIEVES,

and

CONSTRUCTION AND GENERAL LABORERS, LOCAL UNION #25

Case Nos. 13-CA-45023 13-CA-45058 13-CA-45062 13-CA-45194

EXCEPTIONS OF KIEFT BROTHERS, INC. TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

TABLE OF AUTHORITIES

CASES	PAGE(S)
Double D. Construction Group, 339 NLRB 303 (2003)	2
NLRB v. Cook County School Bus, Inc., 283 F.3d 808 (7 th Cir. 1992)	2
NLRB v. Dorothy Shamrock Coal Company, 833 F.2d 1263 (7th Cir. 1987)	3
NLRB v. Louis A. Weiss Memorial Hospital, 172 F.3d 432 (7th Cir. 1999)	2, 3, 4
Park v. City of Chicago, 297 F.3d 606 (7th Cir. 2002)	3
Standard Dry Wall Products, Inc., 91 NLRB 544 (1950) enfd., 188 F.2d 362 (3 rd Cir. 1951)	2
Starcraft Aerospace, Inc., 346 NLRB 1228 (2006)	13
Sundstrand Heat Transfer Inc. v. NLRB, 538 F.2d 1257 (7 th Cir. 1968)	13, 15
Vulcan Basement Waterproofing, Inc. v. NLRB, 219 F.3d 677 (7th Cir. 2000)	3
Wright Line, 251 NLRB 1083 (1980)	3

The Employer-Respondent, Kieft Brothers, Inc. ("Kieft" or "Respondent"), through its undersigned attorneys, files the following Exceptions to the July 21, 2009 Decision of the Administrative Law Judge (the "ALJ") in this matter.

Exception No. 1. The ALJ improperly discredited the testimony of Respondent's Chief Executive Officer, George Smith ("Smith"), and its Chief Financial Officer, Ed Carroll ("Carroll") regarding when Respondent made the decision to engage in the layoffs at issue in this case where the testimony was undisputed because the General Counsel offered no evidence to rebut it. (Decision pp. 13-14).

Argument: As the ALJ conceded in his Decision and Order, at the hearing, Smith and Carroll both testified that the layoffs decisions at issue in the case (how many to layoff and who to layoff) were made in August 2008. (Decision pp. 13-14). The ALJ is correct that neither testified as to a precise date in August that the decision was made, but both testified that the decisions were made in August. The General Counsel offered no witness and no other evidence that contradicted Carroll and Smith's testimony. The ALJ took issue with the fact that Carroll testified that the decision was made "sometime in August, I believe" and later, "sometime in the August time frame," calling the testimony "tentative." (Decision p. 14). But the fact remains that Smith and Carroll (and Respondent's President, Larry Kieft) testified repeatedly that the decisions were made in August 2008. The General Counsel offered no evidence to rebut this testimony and the ALJ cited none. (Decision, *passim*). Rather, the ALJ simply discredited and dismissed the undisputed testimony. Doing so was improper.

The weight of the evidence, in fact all of the evidence, shows that the decisions were made in August 2008, *before* either union filed a petition for an election, and before Respondent was aware of any union activity. Carroll and Smith testified that the decision was made in

August 2008. Larry Kieft, President of Respondent, also testified that the decision was made in August 2008. (Tr. 428-31; 447-51; 464-888; 498-508; 633-35; 722). An exhibit introduced at the hearing (R-1 – a July 2008 performance ranking of all employees) was the basis that Respondent used to determine who would be laid off. (R-1; Tr. 428-32; 447-51; 633-5). Under well-settled law, the ALJ's factual findings must be supported by substantial evidence. *NLRB v. Cook County School Bus, Inc.*, 283 F.3d 808 (7th Cir. 1992). Here, the ALJ's factual finding that the layoffs decisions were made after the elections were held is not supported by any evidence, let alone substantial evidence. Indeed, it is entirely contrary to the evidence introduced at trial. (*Double D. Construction Group*, 339 NLRB 303, 305 (2003); *see also Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950) *enfd.*, 188 F.2d 362 (3rd Cir. 1951). Thus, that finding was improper and should be set aside.

Exception No. 2. The ALJ improperly applied the adverse inference rule against Respondent by improperly by: 1) finding that "Respondent's witness testified that there was no one document he could point to that precipitated the decision to layoff particular people or layoff anyone on November 7 or November 21, 2008"; and 2) by discrediting Chief Financial Officer Ed Carroll's testimony that in August 2008 he calculated the cost savings of laying off the nine (9) employees, merely because Carroll did not produce a document on that exercise, and by relying on those findings to discredit Respondent's affirmative defense that it made the layoff decisions at issue in August 2008 due to its declining economic condition. (Decision pp. 12, 14).

Argument: The adverse inference rule cannot be used to support a party's burden of proof. *See NLRB v. Louis A. Weiss Memorial Hospital*, 172 F.3d 432, 446 (7th Cir. 1999) (stating that "it is perfectly clear from the ALJ's opinion that she considered the gaps in the record to support General Counsel's burden of proof. That can't be."). The "absence of

evidence does not cut in favor of the one who bears the burden of proof on an issue." *Id.* Here, the General Counsel had the burden of proof to show that Respondent made the layoffs at issue because of the employees union activities. *Wright Line*, 251 NLRB 1083 (1980); *Vulcan Basement Waterproofing, Inc. v. NLRB*, 219 F.3d 677, 684 (7th Cir. 2000). To do so, the General Counsel had to show that Respondent was aware of the union activity when it made the layoff decisions. *Id.* The undisputed testimony shows that the decisions were made in August 2008, undisputedly *before* Respondent was aware of any union activity. Nevertheless, the ALJ invoked the adverse inference rule finding against Respondent and in favor of the General counsel as to when the layoff decisions were made based on Respondent's failure to document the August 2008 layoff decision. Under *Louis A. Weiss Memorial Hospital*, the General Counsel cannot use the adverse inference rule to prove its *prima facie* case. By relying on Respondent's failure to document the timing of its layoff decision, the ALJ allowed the General Counsel to do so.

While it may not be used by the General Counsel to state (or the ALJ to find) a *prima* facie case, the adverse interest rule may be used to rebut an affirmative defense in limited circumstances. The adverse inference rule states the failure of the employer to produce evidence that is particularly within its control allows the trier of fact to draw an adverse inference that the evidence would have been unfavorable to the employer. *See NLRB v. Dorothy Shamrock Coal Company*, 833 F.2d 1263, 1269 (7th Cir. 1987). However, "an employer's destruction of or inability to produce a document, standing alone, does not warrant an [adverse] inference." *Park v. City of Chicago*, 297 F.3d 606, 616 (7th Cir. 2002). Rather, to draw such an inference, the General Counsel must show that the reason for non-production is bad faith on the part of the employer. *See id.* (stating that "to draw such an inference, the employer must have destroyed the

documents in bad faith. Thus, the crucial element is not that evidence was destroyed but rather the reason for the destruction."). Here, there is *no* evidence that Respondent's failure to document the layoff decision in August of 2008 was done in bad faith. Rather, as Carroll testified, he did not typically document such decisions and did not document any of various components of the plans he was working on to address Respondent's declining financial condition, including the layoffs. (Tr. 873, 879, 886). While the ALJ may disagree, it is not unusual or unlawful for an employer not to document such decisions. Simply put, in August of 2008, Respondent saw no reason to document its plans and decisions and did not do so.

All of Respondent's witnesses testified that in the spring of 2008, they began discussing the need to layoff employees due to Respondent's declining financial conditions. All testified that the July 2008 performance rating (which was documented, see Exhibit R-1) were done with an eye toward layoffs. All testified that the decision to layoff employees was made in August 2008. All testified that the decision as to how many and who to layoff was also made in August of 2008. The General Counsel offered no evidence to rebut this testimony. Indeed, the ALJ points to none. Under well-settled law, the ALJ's reliance on the fact that Respondent did not document this decision in August of 2008 as evidence that it did not occur at that time was improper. Thus, the ALJ's finding with regard to the timing of the layoff decision should be set aside. (*NLRB v. Louis A. Weiss Memorial Hospital*, 172 F.3d 432, 446 (7th Cir. 1999)).

Exception No. 3. The ALJ failed to give sufficient weight to the testimony and documentary evidence that Respondent introduced to support its affirmative defense that it made the layoff decisions at issue due to economic concerns. (Decision pp. 12-13).

<u>Argument</u>: At the hearing, the General counsel offered no evidence to rebut

Respondent's evidence regarding its perilous economic condition. Nevertheless, in his Decision

and Order, the ALJ dismissed Respondent's economic argument focusing on the fact that Respondent's lender did not actually threaten foreclosure, a lack of a document for the timing of layoffs decisions and a few months where a consistent historically low borrowing base (credit available to cover debt) increased slightly. (Decision pp. 12-13). In his Decision and Order, the ALJ devotes less than two (2) pages to Respondent's economic argument and summarily concludes that it was not "credible." This was improper. First, the Respondent's economic condition was supported by substantial evidence: documents and testimony. Second, the General Counsel did not rebut any of Respondent's evidence with counter evidence. Indeed, the ALJ points to none. Third, there was no basis for the ALJ to conclude that the evidence was not credible. In fact, the ALJ does not offer a basis for this finding beyond the absence of a threat of foreclosure and absence of documents memorializing the layoff decisions which, as discussed above in Exception No. 2, is improper. Fourth, the ALJ erroneously concluded that the Respondent's affirmative defense of economics rests solely on "the credibility of its management witnesses." This is incorrect. In fact, Respondent submitted detailed documents regarding its financial condition, including borrowing base documents (cited by the ALJ); financial statements (ignored by the ALJ); and documents showing that orders were down in 2008 at the time of the layoffs (conceded by the ALJ).

At the hearing, Respondent presented detailed testimony and other evidence as to the economic condition that lead to the layoffs at issue in this case: Larry Kieft, President and former owner of Respondent, testified that in his many years with Respondent, Respondent had never experienced an economic downturn as "drastic" as the one that Respondent faced in 2008. (Tr. 409-11). Kieft estimated Respondent's revenue to be down approximately 35% in the last two years. (Tr. 409-10). Kieft testified that Respondent's largest customer, Dempsy Ing, Inc.,

went bankrupt in 2008, causing Respondent to lose a significant volume of work which it has not replaced. (Tr. 411-12).

Kieft also testified that, by the summer of 2008, Respondent's order volume was down significantly. There were very few new orders coming in and Respondent was not quoting many jobs. (Tr. 803-4, 425-6). That meant, among other things, that Respondent would not need to build inventory over the winter months. (Tr. 425-6). There were no new housing subdivisions being built and no state-funded Illinois public works projects being planned (Tr. 825-6, 425-6), and, consequently, projections for future work were not good. (*Id.*) In the summer of 2008, Respondent started trying to lien jobs. (Tr. 411).

Owner George Smith testified, that by the third quarter of 2007, Respondent saw a decline in revenue that ultimately continued. (Tr. 457-60, 489). Respondent was concerned about escalating costs of raw materials (redi-mix and steel) and fuel. (Tr. 457, 462). Costs were up, profit margins were tightening and business was slowing down. (Tr. 465). One of Respondent's largest customers Dempsy Ing, Inc. owed Respondent \$775,000 and was going out of business. (Tr. 462, 567, 570). Other accounts receivables were stretched. (Tr. 480).

Respondent's audit financial statements which were introduced at the hearing (R-3, R-4 and R-5), show that net sales decreased over the two-year period, fiscal years 2006 to 2008. (*Id.*; Tr. 478). In the spring and summer of 2008, Respondent used those audited financial statements to review past sales and revenue and to make projections for fiscal year 2009. (Tr. 469-70). Demonstrative exhibit R-2 shows those projections, which projected a decline. Two key measures of Respondent's business – deliveries and production – were down 25-30%. (Tr. 487). Smith testified that he believed, based on what he saw at Respondent, his experience in the construction industry and what others in the industry shared with him, that the market would

continue to decline in late 2008 and 2009. (Tr. 478-80, 490, 570). In fact, in November and December 2008, Respondent was 50% below its prior year's budget. In the first quarter of calendar year 2009, Respondent did not make up the shortfall. (Tr. 571-2). At the time of the hearing, as of the first three months of 2009, Respondent was 15-20% below its revised budget. Smith testified that because of this, orders were down significantly and Respondent's projections for business into 2009 had never been so low. (Tr. 490).

In early 2008, conditions continued to decline, Respondent was facing what Smith referred to as a "liquidity crises" (Tr. 495) and was precariously close to defaulting on its bank covenants. (Tr. 495, 566-7). Consequently, Respondent began to consider many cost cutting measures, including layoffs. (Tr. 487). Respondent had been working a plan (referred to by Carroll as the 8-point plan) to try to shore up Respondent's finances in light of the declining business conditions and projections. Cutting labor costs became part of the plan in May 2008. (Tr. 487, 562-64). Smith testified that at that point, Respondent had lost one of its largest customers, prospects for the industry were bleak, costs were increasing, customers were not placing orders, and conversations with customers indicated that they would not increase orders in the future. (Tr. 570-1, 575-6).

Smith testified that beginning in June 2007 and at times in 2008, he met with employees and discussed Respondent's economic challenges. (Tr. 662-3). Employees who testified admitted that Smith did so. (Tr. 24, 78, 100-01). Smith also discussed these issues in his July, 2008 letter to employees. (GC-7). The ALJ took issue with Smith's statement in that letter that he was "hopeful" that if employees were focused on the health of Respondent and if Respondent "strives to work efficiently," that Respondent would be "well positioned to make it through

-

¹ As Smith testified, internal management statements introduced at the hearing and testified to by Carroll, show this 50% budget decline. (Tr. 574).

without layoffs." (Decision p. 11). Smith admitted that when he wrote that letter, he knew Respondent would engage in layoffs. Indeed, in the letter, Smith also reminded employees that they were "at-will" and not guaranteed employment. (Decision p. 4). The letter, while perhaps inspiring false hope, was not a promise not to layoff employees. Smith testified that he had some hope (Tr. 578), as did Kieft (Tr. 752-4, 811). In any event, that statement is not a promise not to layoff. And, it does not negate Respondent's undisputed testimony that a month later, in August 2008, it decided to layoff nine employees (5 drivers and 4 laborers).

Co-Owner Ed Carroll and Chief Financial Officer testified in even greater detail than Smith about Respondent's declining economic condition, the 8-point plan to try to address it, the financial forecasting he did, and why, by August 2008, the layoff of nine employees (in addition to the other cost cutting measures) was critical.

Carroll authenticated and testified about group Exhibit R-9, the borrowing base documents Respondent submits to its primary secured lender, First Chicago Bank and Trust, each month. (Tr. 839). With regard to the borrowing base documents (essentially the amount of money a lender is willing to lend against collateral or as Carroll called it the "cash availability" to run the business), in the spring of 2008, the borrowing base was down significantly as compared to 2007. (Tr. 863-7). From May to November, 2008, it continued to drop (albeit with a rise in July) and by November, it was just \$49,000. (Tr. 864-69). This created liquidity crisis. As Carroll testified, that low of a borrowing base could be "wiped out" by one payroll cycle, or one customer who does not pay their bill that month. (Tr. 869). Default and liquidation was a serious threat. (*Id.*; Tr. 879-82).

Carroll also authenticated and testified about R-14 to R-24, the Balance Sheets for Respondent for May 2008 through May 2009, and R-25 to R-35, the Income Statements for that

same period. (Tr. 841-43). These two sets of documents together are known as "internal management statements" and are used to prepare the audited financial statements. (R-4, R-5 and R-6; Tr. 846-7). Carroll used them to create and update his forecasting models. (Tr. 846-8). As Carroll testified, referring to R-14 and R-25, in May 2008, Respondent had a revenue base of \$1.6 million which was "disturbing," because May was the start of the busy season and, thus, the revenue base should have been over \$2 million. (Tr. 849). Carroll testified that things got worse in June and July, the height of the busy season, as the net revenue base decreased. (R-15, R-16, R-26, R-27; Tr. 850-1). Carroll also gave detailed testimony about Respondent's audited financial statements for 2006, 2007 and 2008. (R-3, R-4 and R-5). They show a 30% drop in revenue in 2006 to 2008. (Tr. 854).

Carroll explained the perilous state of business at Respondent in the spring and summer of 2008 leading up to the layoff decisions in August 2008. He explained that his concern about the economic viability of Respondent increased as the summer of 2008 progressed because the three markets Respondent served – residential, housing, commercial buildings and government construction projects (highways) – were down significantly. The residential sector was at a standstill, the commercial sector was falling off fast and the government sector was troubled because municipalities lacked tax revenue to pay for projects. (Tr. 855-6). Carroll testified that he kept changing its revenue forecasts to adjust to the declining markets, yet Respondent continued to miss revised revenue targets. (Tr. 856-7).

Carroll and Smith testified that Respondent engaged in several other cost cutting measures as part of the 8-point plan. (Tr. 562-6, 706-12, 884-7). Respondent terminated two non-union salaried employees, Mark Geraci and Tom Kieft. (Tr. 598, 653-4). Respondent also deferred payments to shareholders in 2008 and 2009 because Respondent did not meet its

financial targets. (Tr. 654-5; Tr. 435-6). Because of the liquidity crisis, and the need to preserve cash, Respondent also declined to make a seller note payment due in August 2008. (Tr. 654-5). Smith also directed management to reduce overtime. (Tr. 655). Respondent also approached suppliers and attempted to get price concessions, but those efforts failed. (Tr. 653). Respondent eliminated one of two bonus programs, the profit sharing bonus program, due to its financial condition. (Tr. 455-6). Respondent began "liening jobs" to force customers to pay money owed to Respondent. (Tr. 411, 435-6). Finally, Smith put his management fee back into the business and The Freedom Group (Owners) made a capital contribution to Respondent. (Tr. 671, 869). Layoffs became part of the plan in the spring. (Tr. 724-5). Conditions deteriorated and, in August 2008 (before either union filed a petition for an election), Respondent decided to layoff the nine employees. (Tr. 728-30).

Smith, Carroll and Kieft did not document all of the discussions they had in the spring or summer of 2008 and the many steps they took to assess and address the declining economic condition of Respondent, the bleak outlook for work and the many cost cutting measures it needed to engage in to address those issues. Carroll did not create a document called the 8-point plan. (Tr. 570, 700-1, 873, 879, 886). Rather, he simply did not keep the many versions of the forecasting model, but updated it on his computer. (Tr. 648-9, 716-17). Employers are not required to document all such events and, as discussed above in Exception 2, the ALJ's reliance on the lack of documentation to discredit Carroll's and Smith's testimony was improper.

The overwhelming weight of the evidence introduced at the hearing showed that Respondent's economic condition was dire. Yes, the ALJ ignored this evidence and found that Respondent's economic decision was not dire. That finding is not supported by substantial evidence. Rather, it is contrary to the undisputed evidence. Thus, it should be set aside.

Exception No. 4. The ALJ improperly concluded that Respondent's witness, Chuck Rogers ("Rogers"), did not contradict Laborer Jaime Nieves' ("Nieves") testimony wherein Nieves alleged that Rogers accused him of being "the one that calls the agencies and who called the unions" and stated that "he'd probably lose his job for it" where Rogers specifically testified that neither he (Rogers) or Nieves brought up the subject of the union. (Decision p. 6).

Argument: Contrary to the ALJ's conclusion, Rogers testified quite clearly as to his conversation with Nieves. In particular, contrary to the ALJ's conclusion, Rogers did not testify that "the conversation changed to a conversation about the union" but later deny that subject of union's came up. (Decision p. 6). Rather, Rogers testified as follows: "I was talking about the economy and I think it kind of changed to a union conversation on Jaime's part." (Tr. 368-9). Clearly, Rogers testified that he assumed that Nieves thought that the conversation was about the union. Contrary to the ALJ's finding, Rogers did not testify that Nieves (or her) mentioned the union specifically. Rogers went on the testify in detail about the conversation. Rogers testified that he (Rogers) began it by talking about the economy and job losses generally. Nieves asked him if that was a "threat" to which Rogers responded "no" and ended the conversation. (Tr. 370-2). As Rogers testified, neither he nor Nieves raised the topic of the union in that conversation or any other. (Tr. 372). The ALJ misread Rogers' testimony and then improperly relied on that misreading to find that Rogers did not deny Nieves' version of the conversation and, thus, Rogers violated Section 8(a)(1) of the Act. (Decision p. 6; Tr. 160; 368-376). Because Rogers clearly denied Nieves' version of the conversation, the ALJ's conclusion that he did not, and his using that conclusion to discredit Rogers and find him (and Respondent) guilty of anti-union animus, was improper and should be set aside.

Exception No. 5. The ALJ improperly concluded that Rogers did not contradict Laborer, Miseal Ramirez ("Ramirez"), who claimed that he overheard Rogers tell someone with whom he was speaking on the telephone that "the union was coming in and someone was going to get fired" and where Rogers specifically testified that he never told anyone that they might be fired for supporting the union. (Decision p. 6).

Argument: Contrary to the ALJ's conclusion, Rogers *did* deny that he said what Ramirez testified Rogers said in his presence. In fact, when questioned about this allegation, Rogers testified that he never said, while talking to someone on his cell phone, that employees who brought in the union would be fired. In fact, Rogers testified that he never uttered those words. (Tr. 376). Rogers did not need to testify that he never said these words on a cell phone in *Ramirez presence* because he testified that he never said them at all. *Id*. The ALJ ignored this part of Rogers' testimony and improperly relied on the absence of this testimony to find that Rogers violated Section 8(a)(1) of the Act. (Tr. 375-376). Because Rogers clearly denied Ramirez' version of this incident, the ALJ's conclusion that he did not, and his using that erroneous conclusion to discredit Rogers, and find him (and Respondent) guilty of anti-union animus, was improper and should be set aside.

Exception No. 6. The ALJ improperly awarded back pay to the four (4) drivers whom Respondent laid off, ignoring Respondent's uncontradicted evidence that the lay-off decisions were made *before* the employees elected the Teamsters as its bargaining representative and the ALJ's remedy of back pay was not appropriate because even if the Respondent had bargained the decision, bargaining would have been futile. (Decision pp. 9-10, 16).

Argument: As the ALJ noted in his Decision and Order, if the layoff decisions were made before Teamsters Local 673 became the bargaining representative for the drivers,

Respondent was not obligated to bargain with the Teamsters over the layoffs. (Decision p. 9); *Starcraft Aerospace*, *Inc.*, 346 NLRB 1228 (2006). As discussed above in Exceptions 1 and 2, the ALJ's conclusion that Respondent made the layoff decisions not in August, but rather in November after the Teamsters were certified as the bargaining representative, and, thus, was required to bargain the decisions as to drivers with the Teamsters, was in error because it was not based on substantial evidence. Moreover, even if the decisions were made after the election and Respondent's was therefore obligated to bargain, the ALJ's remedy of back-pay was improper.

In *Sundstrand Heat Transfer Inc. v. NLRB*, 538 F.2d 1257, 1260 (7th Cir. 1968), the Court rejected a back-pay remedy for the failure to bargain over the effects of a layoff. In *Sundstrand*, the employer implemented layoffs unilaterally, due to compelling economic circumstances. The Board ordered the employer to make whole all employees who were laid off until they were placed on recall lists. The Seventh Circuit Court of Appeals rejected the Board's order. The Court reasoned that back-pay was inappropriate because "if the employer had a duty to bargain, a full back-pay remedy must [be] predicated on the assumption that bargaining over the effects of the layoff would have kept the employees on the job. This is wholly improbable under the facts of this case [due to the change in economic circumstances]. Therefore, the back-pay remedy would be unreasonable." 538 F.2d at 1260.

The facts of *Sundstrand* are applicable here. In this case, Respondent, like *Sundstrand*, implemented layoffs due to compelling economic circumstances. Under the *Sundstrand* Court's reasoning, a full back-pay remedy must be predicated on the assumption that bargaining over the effects of the layoffs would have kept Respondent's employees on the job. This is wholly improbable. It is undisputed, and the ALJ conceded, that in the spring of 2008, Respondent's business was in decline; its costs had increased dramatically and revenues and projected

revenues were down significantly. By that time, Respondent's performance was already below its revised budget for the year by 15-20%. (Tr. 571). Projections for the next 3 quarters for fiscal year 2008 were bleak because Respondent had already lost one of its largest customers (Tr. 570), and orders from other customers were down significantly. The industry was in decline (Tr. 478-80, 490, 570-1), and that there was no expectation of work from public works projects or the construction of new home subdivisions, the main sources of revenue for Respondent. (Tr. 425-6, 825-6, 490, 885-6). As Smith and Carroll testified, at the time of the layoffs in November of 2008, Respondent was 50% below its revenue from 2007 and well below its revised fiscal year 2008 budget. (Tr. 572-72). By that time, one of Respondent's largest customers, Dempsy Ing, had closed its doors, owing Respondent \$775,000 dollars. (Tr. 566).

As Carroll and Smith testified, given all of this, the layoffs were absolutely necessary to remain in business and avoid a liquidity crisis which would have resulted in Respondent defaulting on credit arrangements. (Tr. 555-59; 566-7, 855-61, 863-4). In fact, as Smith testified, in November of 2008, Respondent's borrowing base was the lowest it had been since Smith and Carroll acquired Respondent. (Tr. 560, 566). At that time, Smith and Carroll were seriously and legitimately concerned about the viability of Respondent. Moreover, as some employees admitted at the hearing and as he documents Respondent introduced showed, through the fall of 2008 and winter 2009 after the nine layoffs, Respondent managed its business without significant additional overtime hours despite the layoff of five drivers and four laborers. (Tr. 50-51; 245; 319-20; R-6; R-7; R-10; R-11 and R-12.) Clearly, the layoffs and other cost cutting measures were necessary, in fact critical, to Respondent's survival. Bargaining over the effects of the layoffs would have been futile as Respondent already made the decision based on overwhelming economic factors. Respondent had also taken several other steps to cut costs.

Smith put his earnings back into the business (Tr. 671) and the Freedom Group (the Owners) have made a capital contribution to Respondent. (Tr. 869).

The ALJ did not refute Respondent's evidence regarding its economic condition. In fact, as discussed above in Exhibit 3, at the hearing, none of this evidence was refuted. Yet in his Decision and Order, the ALJ barely discussed it. Rather, he stated that no lender had threatened foreclosure, and that in a few months, the borrowing base (amount of credit available to pay debt), which was at a historic low, increased slightly. (Decision p. 12-13). As discussed above in Exception 3, a review of the evidence (undisputed, but ignored by the ALJ) was that Respondent's economic condition was dire. Pursuant to the rationale of the *Sundstrand* Court, the ALJ's back-pay remedy against Respondent is unreasonable because bargaining over the effects of the layoff would not have kept the laid-off employees on the job and, thus, it should be set aside.

Exception No. 7. The ALJ improperly concluded that Larry Kieft coerced Dickerson with regard to his attendance at the rally in violation of section 8(a)(1) of the Act (by allegedly threatening him as he left work to attend it) where Dickerson admitted that he went to the rally and that Kieft did not criticize him for doing so. (Decision p. 5).

Argument: Driver Chuck Dickerson claimed that as he left to go to a union rally on Respondent's premises, Kieft said why don't you go join the rest of the "unemployed." Kieft denies saying this. The ALJ believed Dickerson; however, Dickerson did not testify that he felt coerced. Rather, he said he went to the rally despite what Kieft allegedly said and that Kieft did not criticize him for doing so. (Tr. 98-9). Thus, the ALJ's finding that Dickerson was coerced is not supported by substantial evidence and should be set aside.

Exception No. 8. The ALJ improperly concluded the fact that Kieft called the local police in on the day of the rally, was evidence of anti-union animus where Kieft testified that he did so because a fellow tenant called him to "complain" about the rally blocking traffic an where the General Counsel failed to rebut this testimony. (Decision p. 5).

Argument: The rally at issue was on Respondent's property. (Tr. 748-49). Kieft testified that he called the police because a neighboring tenant called him to complaint about the rally. (Tr. 820-21). There is no evidence that the police interfered with he rally, although the police did tell employees to move cars which indicates that they were blocking ingress and egress. (Tr. 787). The ALJ ignored Kieft's stated reason for calling the police and improperly concluded that it showed anti-union animus. This conclusion should be set aside.

Exception No. 9. The ALJ improperly concluded that Respondent hired a "martial arts fighter as a security guard" solely for being on the premises during the election and relied on this improper conclusion as evidence of anti-union animus where there was no testimony as to whether this person (a police officer) was a "martial arts fighter." (Decision p. 5).

Argument: The so-called "martial arts fighter" to which the ALJ refers did not testify at the hearing. Larry Kieft testified that this person wore a tee-shirt with a wrestling logo. (Tr. 424). There is no evidence that this person was a "martial arts fighter." The ALJ cites no evidence to support this unfounded conclusion and his reliance on this unfounded conclusion as evidence of anti-union animus by Respondent was improper and should be set aside.

WHEREFORE, Employer-Respondent, Kieft Brothers, Inc., requests that the National Labor Relations Board:

1. Reject the following Conclusions of Law in the Decision of the ALJ: 1, 2, 3, 4, 5 and 6:

including the Remedy to reinstate the nine (9) employees (Miseal Ramirez, Brandon White,

Reject the Remedy articulated by the ALJ to address these Conclusions of Law,

Eracillo Esparza, Mike Krankow, Ray Embury, George Kent, Charles Dickerson, Jaime Nieves

and Jose Jordon) and to award them back pay and benefits;

3. Reject the following Paragraphs of the ALJ's recommended Order: 1(a), (b), (d),

(e); 2(a)-(f);

2.

4. Reject those portions of the ALJ's written opinion related to the above mentioned

provisions of the ALJ's recommended Summary Conclusions of Law, Remedy and Order;

5. Grant Employer-Respondent oral argument with regard to these Exceptions; and

6. Order any other relief that the National Labor Relations Board deems appropriate.

Dated: August 18, 2009 Respectfully submitted,

By: s/Linda M. Doyle

Linda M. Doyle McDermott Will & Emery LLP 227 W. Monroe Street Chicago, Illinois 60606 (312) 372-2000

Attorney for Respondent, Kieft Brothers, Inc.

CERTIFICATE OF SERVICE

I certify that on this 18th of August, 2009, copies of the foregoing **EXCEPTIONS OF**

KIEFT BROTHERS, INC. TO THE DECISION OF THE ADMINISTRATIVE LAW

JUDGE was e-filed upon the following:

The Board's Office of The Executive Secretary National Labor Relations Board 1099 14th Street, N.W. Washington, DC 20570

and sent via electronic mail to:

Brigid M. Garrity, Board Agent National Labor Relations Board Region 13 209 S. LaSalle Street, 9th Floor Chicago, Illinois 60604 Brigid.Garrity@nlrb.gov

John Toomey, Esq. Arnold & Kadjan 19 W. Jackson Blvd. Chicago, Illinois 60604 Jtoomey100@hotmail.com

Robert Cervone, Esq.
Dowd, Bloch & Bennett
8 S. Michigan Ave., 19th Floor
Chicago, Illinois 60606
rcervone@dbb-law.com

s/Linda M. Doyle
Linda M. Doyle

CHI99 5153545-1.075395.0011